

MAY 21 1990

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA

WARREN L. YADLOCK, CLERK
[Signature]
Deputy Clerk

In Re:)	Case No. C-B-90-30232
)	Chapter 13
MENDEL MAURICE GULLEDGE,)	
d/b/a Buy Square,)	
f/d/b/a G & S Enterprises,)	
)	
Debtor.)	
<hr/>		Consolidated With
JUDY HOLLEY GULLEDGE,)	Case No. C-B-90-30068
)	Chapter 13
Debtor.)	
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JUDGEMENT ENTERED ON MAY 21 1990

**ORDER GRANTING DEBTORS' MOTION FOR 11 U.S.C. § 362(h)
SANCTIONS AGAINST SOUTH CAROLINA TAX COMMISSION**

This matter is before the court on the motions of Mendel M. Gulledge and Judy H. Gulledge ("debtors") for an award of actual and punitive damages against the South Carolina Tax Commission ("SCTC"). After hearing the evidence and arguments by both parties, and reviewing all relevant authority in light of the complete record in this case, it is the conclusion of the court that the acts of SCTC against the debtors were willful violations of 11 U.S.C. § 362. Accordingly, the court grants the debtors' motion.

It should be noted at the outset that the two debtors involved in this proceeding each filed separate bankruptcy petitions under Chapter 13. By Order of the court on May 11, 1990, the separate petitions were consolidated for purposes of administration.

Facts

Prior to filing their respective bankruptcy petitions, the debtors owed back taxes to SCTC for years 1984 and 1985. Because of non-payment, SCTC issued warrants of distraint for each unpaid tax year. A levy of attachment was then placed upon the wages of Judy Gullledge, and SCTC began to receive some payment for the tax debts.

The debtors each filed their Chapter 13 petitions in early 1990. SCTC was listed as a creditor in each case and was notified of the debtors' filings. SCTC acknowledged its receipt of this notification by facsimile transmitted to the debtors' attorney. At that time, the levy on Judy Gullledge's wages was lifted. Thereafter, SCTC filed a proof of claim against Judy Gullledge.

Despite having notice of both pending bankruptcy cases, and after it had filed its proof of claim in the case of Judy Gullledge, SCTC mailed two notices to the debtors on March 14, 1990. Each notice stated the full amount due on the 1984 and 1985 taxes respectively. The language of the notices explained that a "warrant for distraint" had been filed against the debtors' property; that it was a lien; and that interest and penalties would continue to accrue until the taxes were paid. Finally, the notice also contained language stating that it was not a demand for payment if the recipient was in bankruptcy. The current motion was filed on March 28, 1990, and SCTC has ceased all contact with the debtors since that date.

Discussion

A. Jurisdiction

SCTC has contested this court's jurisdiction to award damages against it in favor of the debtors. The court recently had occasion to address a similar jurisdictional argument in In re Moster, Case No. C-B-89-30523 (March 2, 1990), and will follow its conclusion in that case.

With regard to Judy Gulledge's Chapter 13 case, jurisdiction clearly exists as a consequence of SCTC's filed proof of claim. Hoffman v. Connecticut Dept. of Income Maintenance, ____ U.S. ____, 109 S.Ct. 2818 (1989); In re Moster, Case No. C-B-89-30523 (March 2, 1990).

SCTC has not filed a proof of claim against Mendel Gulledge. The court concludes, however, that jurisdiction exists with regard to Mendel Gulledge's case as well. As stated by the court in Moster:

The turnover and preference actions prohibited in Hoffman can be readily distinguished from the present motion for sanctions against [SCTC]. A turnover or preference action has as its purpose the disgorgement from a state monies already paid to it. An award under § 362(h), on the other hand, serves to restore a debtor (or his estate) who has been damaged by a state's intentional wrongful conduct in violation of the stay. To a lesser extent, § 362(h) serves to punish the state for its wrongful actions as well.

To hold that § 362(h) does not apply to a state unless it has filed a proof of claim would be to undermine one of the Code's fundamental protections for debtors. States would be free to act with impunity in the face of the stay's protection and work to thwart a debtor's fresh start. Such a state of affairs cannot be allowed to exist.

Consequently, the court has concluded that it has jurisdiction over SCTC in each of these consolidated cases.

B. Application of § 362(a)

The scope of the § 362(a) automatic stay is very broad. In re Bialac, 712 F.2d 426 (9th Cir. 1983). The terms of § 362(a) clearly encompass the notices sent by SCTC to the debtors in this case. The notices contained the following language:

PLEASE TAKE NOTICE THAT:
A WARRANT FOR DISTRRAINT HAS BEEN RECORDED WITH THE CLERK OF COURT IN THE COUNTY IN WHICH YOU RESIDE FOR THE DELINQUENT OR UNPAID TAXES LISTED. IT IS A JUDGMENT AND A LIEN ON ALL PROPERTY: PENALTY AND INTEREST WILL ACCRUE UNTILL (sic) SATISFIED. This is not a demand for payment if you are currently in bankruptcy proceedings under Title 11 of the U.S. Code.

* * *

NO OR PART REMITTANCE

* * *

THIS COPY MUST ACCOMPANY REMITTANCE.

(Emphasis added). The above language used by SCTC in the warrant is harsh and includes terms that can be read as: (1) a demand for payment, (2) a creation of a judgment and lien, and (3) an imposition of penalties until payment is received. It is this type of communication from creditors that § 362(a) is designed to prohibit.

SCTC argues that the sentence: "This is not a demand for payment if you are currently in bankruptcy proceedings under Title 11 of the U.S. Code." is sufficient to prevent a violation of § 362(a). The court does not agree. While the sentence may prevent the notices from violating § 362(a)(6), there are at least three other subsections of § 362(a) that still are violated by this notice: subsection (a)(2) which prevents the enforcement

of judgments; subsection (a)(4) which prevents the creation, perfection or enforcement of liens against estate property; and subsection (a)(5) which prevents creation, perfection or enforcement of liens against the debtors' property each stand in prohibition of the SCTC notices. The disclaiming sentence on which SCTC relies does not go far enough to offset the overall breadth and harshness of the notice's language.

There is a further aspect regarding the mailing of SCTC's notices that troubles the court. At the hearing, an official from SCTC indicated that it was the notification of the debtors' bankruptcy petitions that triggered SCTC's mailing of the notices in the first place. It is almost inconceivable that SCTC uses such a system of notice. SCTC is well aware of the effect of the automatic stay upon the initiation of a bankruptcy case. See In re Shealy, 90 B.R. 176 (Bkrtcy. W.D.N.C. 1988). Yet, not only does SCTC initiate contact with debtors when the stay mandates such contact should cease, but the contact it undertakes is in the form of a communication as harsh as these notices. SCTC represented to the court that it has gone to great effort to comply with § 362 since the decision in Shealy, supra, but, the court cannot understand why SCTC insists on continuing this notice practice when it would be so simple to comply with § 362, either by sending no further communications or by sending one that is clearly just a statement of the deficiency balance as allowed by § 362(b)(9). When it would be so simple to comply with § 362, the court can only infer from SCTC's failure to do so

that the true purpose of its notice procedure is to collect its debt or effect other action in willful violation of § 362 -- notwithstanding the limited disclaimer language.

C. Section 362(b)(9) Exception

The court notes that § 362(b)(9) offers an exception to the automatic stay for "the issuance to the debtor by a governmental unit of a notice of tax deficiency." That exception does not apply under the present facts. Dept. of Revenue v. H&H Beverage Distributors (In re H&H Beverage Distributors), 850 F.2d 165. (3d Cir. 1988), cert. denied, ____ U.S. ____, 109 S.Ct. 560 (1989); In re Moster, Case No. C-B-89-30523 (March 2, 1990).

When creating a notice procedure, SCTC would be well advised to establish a system which would fall within the scope of § 362(b)(9).

D. Willful Violation

Section 362(h) only imposes sanctions for a creditor's "willful" violation of the stay. Courts have generally interpreted "willful" in the § 362(h) context as meaning "intentional or deliberate" conduct. See Budget Serv. Co. v. Better Homes of Virginia, 804 F.2d 289 (4th Cir. 1986); In re Tel-A-Communications Consultants, Inc., 50 B.R. 250, 254 (Bkrtcy. D. Conn. 1985). SCTC's act of mailing the two notices after it had notice of the pending bankruptcy cases meets this standard. As noted above, the notices (even as disguised by the disclaimer), appear designed to gain an unlawful advantage over other creditors by

prompting payment of SCTC's debt. This is clearly a willful violation of § 362(a).

E. Damages

Section 362(h) entitles a debtor to actual damages, including costs and attorneys' fees, and, in some instances, punitive damages. The court finds that this case is not one in which punitive damages are warranted. At the hearing, however, the testimony of Judy Gullledge indicated that SCTC's conduct had caused her to miss at least one day of work, and to incur travel expenses for the hearing. The testimony offered by Judy Gullledge regarding the stress caused to her by SCTC's actions, while credible, was not of a serious enough nature to warrant compensation. No evidence was offered showing any damages suffered by Mendel Gullledge. Accordingly, the court finds the actual damages suffered by Judy Gullledge in this case were \$75.00.

The debtors also are entitled to an award of attorneys' fees and costs associated with this motion. The court will assess such fees and costs upon application by the debtors' counsel.

It is therefore ORDERED that:

1. The debtors' motion for sanctions is granted, and the debtors are awarded \$75.00, to be paid by the South Carolina Tax Commission as actual damages suffered by violation of 11 U.S.C. § 362(a). This sum is to be paid to the debtors within thirty days of the date of this Order;

2. The debtors' requested for punitive damages is denied;
and

3. The debtors are entitled to recover from the South Carolina Tax Commission reasonable attorneys' fees and costs. Counsel for the debtors shall have ten days from the date of this Order to submit (and serve on the South Carolina Tax Commission) application for such fees and costs, detailing time and expenses related to this motion. The South Carolina Tax Commission will have ten days thereafter to respond. The court will then assess the amount of such fees and costs due.

This the 21st day of May, 1990.



United States Bankruptcy Judge